



POLICE DEPARTMENT

February 23, 2009

MEMORANDUM FOR: Police Commissioner

Re: Sergeant John Vanorden
Tax Registry No. 907498
Gang Squad Brooklyn South
Disciplinary Case No. 83202/07

The above-named member of the Department appeared before me on January 7, 2009 and January 21, 2009, charged with the following:

1. Said Sergeant John Vanorden, assigned to Manhattan Gang Squad, on or about January 25, 2007, while on duty, within the confines of Orange County, did wrongfully bring an intoxicant, to wit: several bottles of beer, into a Department vehicle without permission or authority to do so.

P.G. 203-06, Page 1, Paragraph 2 – PERFORMANCE ON DUTY-
PROHIBITED CONDUCT

2. Said Sergeant John Vanorden, assigned to Manhattan Gang Squad, on or about January 25, 2007, while on duty, within the confines of Orange County, did engage in conduct prejudicial to the good order, efficiency and discipline of the Department, in that said Sergeant did wrongfully consume an intoxicant, to wit: a quantity of beer, while on duty.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT-
PROHIBITED CONDUCT

3. Said Sergeant John Vanorden, assigned to Manhattan Gang Squad, on or about January 25, 2007, while on duty, within the confines of Orange County, did engage in conduct prejudicial to the good order, efficiency and discipline of the Department, in that said Sergeant did wrongfully distribute intoxicants, to wit; a quantity of beer, to two Members of the Service whose identities are known to this Department, while conducting a surveillance operation.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT-
PROHIBITED CONDUCT

4. Said Sergeant John Vanorden, assigned to Manhattan Gang Squad, on or about January 25, 2007, while on duty, within the confines of Orange County, did wrongfully and without just cause fail to supervise a Member of the Service under his supervision, to wit; Sergeant Vanorden failed to take action after a Member of the Service, identity known to this Department, left his post without permission or authority or police necessity for approximately 3 hours.

P.G. 202-17, Page 1, Paragraph 1 – PATROL SUPERVISOR,
DUTIES AND RESPONSIBILITIES

5. Said Sergeant John Vanorden, assigned to Manhattan Gang Squad, on or about January 25, 2007, while on duty, within the confines of Orange County, upon receiving information or becoming aware of an allegation of corruption or serious misconduct involving another member of the service, to wit: said Member of the Service left his post for approximately three hours, Sergeant Vanorden failed and neglected to report said information to his Commanding Officer and/or the Internal Affairs Bureau, Command Center, as required.

P.G. 207-21, Pages 1 & 2 – ALLEGATIONS OF CORRUPTION AND
SERIOUS MISCONDUCT AGAINST MEMBERS
OF THE SERVICE

The Department was represented by Penny Bluford-Garrett, Esq., Department Advocate's Office, and the Respondent was represented by Bruno Gioffre, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to Specification Nos. 1, 2, and 3 and a plea of Guilty to Specification Nos. 4 and 5. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty of Specification Nos. 1, 2 and 3. The Respondent, having pled guilty, is found Guilty of Specification Nos. 4 and 5.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Sergeant Noel Lamberty as a witness.

Sergeant Noel Lamberty

Lamberty is a 16-year member of the service who has been with the Chief of Detectives Investigations Unit (CDIU) for about 4 years. Lamberty conducted an Official Department Interview of Detective [REDACTED] in relation to this matter. [REDACTED] had been a member of the Manhattan Gang Unit (hereinafter Gang) and as far as Lamberty knows [REDACTED] is now retired. [REDACTED] told him that he and a team were going to Orange County to conduct surveillance on a location where a warrant was to be executed the next day. While en route they stopped at a minimart gas station. The Respondent got out, went to the minimart and returned with three bottles of beer. He placed the bag containing the beers in the rear seat of the vehicle where [REDACTED] was seated. [REDACTED] further told Lamberty that he threw the beer out of the window. They then went to the surveillance location where they stayed for half an hour to 45 minutes. When they left the location the Respondent wanted something to eat at a diner and [REDACTED] didn't want anything to eat. [REDACTED], who lived nearby, exited the vehicle and went home. This happened at about 2000 hours and Lamberty indicated that Department records showed that he was still on duty at the time.

Subsequently [REDACTED] went back to the minimart and obtained the videotape of the Respondent purchasing the beer which was received in evidence as Department Exhibit 1.

Lamberty also conducted an Official Department Interview with Detective Edward Cahill. Cahill also stated that the mission was to conduct reconnaissance before a warrant was to be executed. He also said they stopped at a convenience store and that the Respondent purchased alcohol and gave each person in the vehicle a bottle of beer. Cahill did not object to the beer and he drank some in the car and while they were conducting the surveillance. Cahill was not subject to any disciplinary action.

Cahill further told Lamberty that the Respondent and [REDACTED] argued about the purchase and consumption of alcohol. Cahill told Lamberty that once the reconnaissance was done they were headed back to the command when the Respondent decided he wanted to stop at a diner to eat. [REDACTED] exited the vehicle and went home.

Cahill further told him that the Respondent ordered [REDACTED] back to the vehicle but he refused. [REDACTED] called Cahill on his cell phone because he had left his house keys in the car. They drove to where [REDACTED] was and gave him the keys and again [REDACTED] refused to get in the car.

On cross-examination Lamberty conceded that when he reviewed his work sheet Cahill did not say that he drank while en route to the surveillance and that he only did so when they got to the location. Lamberty agreed that Cahill indicated that [REDACTED] never said anything about not wanting to drink because he did not want to get in trouble. Further, Lamberty indicated that Cahill did not recall [REDACTED] throwing anything out of the window.

Lamberty agreed that the Respondent was not in his police uniform at the time of the incident. Lamberty said that in recommending charges he did not feel that the act of consuming alcohol was in the performance of the Respondent's official duties.

On re-direct examination Lamberty testified that the Respondent told him that he had consumed alcohol while on duty in the past and that he had received authorization to do so. He further indicated that the Respondent acknowledged that he did not get authorization on January 25, 2007.

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent has been with the Department for 15 years; he has been in Gang since 2001. Previously he had worked in Narcotics Borough Queens and before that as a sergeant in the 110 Precinct.

In Narcotics he served in an undercover capacity and he received training in connection with that assignment. Asked to explain he stated, "After conferring with a supervisor, alcohol could be used as a prop on numerous occasions consumed and also held in and out of locations numerous times on the street to blend in a certain area without being discovered as a police officer. Alcohol could be used as a prop...As long [as] you were never affected—the performance of your duties, and you were never intoxicated or unfit for duty." He denied that alcohol was used for personal gratification.

In the Gang Squad he conducted numerous operations and did many search warrants which required supervisors to surveil the locations prior to execution of the warrants. To do so properly it was important not to be identified as a police officer.

In conducting those surveillances he applied his training as an undercover stating that it was a tool that could be used if you were in plain clothes. He noted that a lot of reconnaissance is the same type of policing as an undercover.

The Respondent indicated that he does not deny the facts alleged in Specification Nos. 1, 2 and 3 and that is something he has done in the past. He said that it was not done a lot but it has been done on occasion in the past.

He asserted that, "It was a practice that all supervisors above me were aware of and encouraged if it was necessary to gather the proper facts and have the investigation lead to an arrest in the future."

The Respondent indicated that on January 25, 2007 he was working with [REDACTED] and Cahill. That day, they were doing reconnaissance for a search warrant that was going to be executed. The location was the town of New Windsor in Orange County. They were going to meet with the Orange County Sherriff's office as they were going to assist in the execution of the warrant and then they were going to conduct a reconnaissance of the location. He indicated that they were focused on getting narcotics but the warrant also involved guns.

The Respondent indicated that they picked [REDACTED] up on the way near his home in Orange County. He said [REDACTED]'s home was about 20 minutes away from the subject location. En route to the police department they stopped and he purchased three bottles of alcohol at a minimart. He said he asked what kind of beer the others were drinking and he purchased a Coors Light, a Budweiser and a Corona.

The Respondent indicated that he had previously worked with the other two and no one ever objected in the past to the purchase of beer. The Respondent indicated that

██████ did not object to the beer being used for the reasons stated and that the only conversation they had in the vehicle after that was about the fact that they would pose as construction workers to get a view of the location and that the beer was going to be used as a prop to blend into the area. He denied that ██████ threw the beer out of the window.

The beer, he indicated, was for his police duties and that it was "sips of the beer" so they could get a good view of the location. He indicated that there were brown bags but that he thinks they may have been taken out of the brown bag: "I had no problem having anyone have a visual of me with a bottle of beer." He said they were at the location for about 45 minutes. He did not believe that they finished the beer and that the bottles were discarded in a dumpster.

He said that based on his training it was his understanding that possessing or drinking alcohol was authorized if it is in the performance of duty "so long as you are not intoxicated." He stated: "Due to my prior experience that it would have a big tendency to put people at ease as are to assume that police officers would never be drinking on-duty but construction workers at that location would be doing that type of activity."

As they headed back to the city the Respondent wanted to stop at a diner to get something to eat. ██████ did not want to eat "and apparently disagreements occurred and he exited the rear of the vehicle." This happened at about 2030 hours; the tour he believed was over at 11:00 or 11:30 p.m.

The Respondent said ██████ wanted to walk home but he told ██████ that he was acting unprofessionally and to get back into the car and that this would not be tolerated. ██████ responded that he had been under a lot of stress and wanted to go home. The Respondent denied that ██████ said anything about being uncomfortable

about the alcohol. He said that he made numerous attempts to get [REDACTED] back in the car. Further, Cahill got him on the cell phone and [REDACTED] said he was not getting back in the car and that he was walking home. They had followed him down the street, made a U-turn, lost him for a period of time, regained sight of him and attempted to get him back in the car. After a period of time they went back to the Gang Squad without [REDACTED]. The Respondent said that he "attempted to notify someone which was to no avail then that was the end of the tour."

He was then asked:

Q: You didn't make any efforts after that; do any notifications?

A: That was done the next day.

Q: What was your intention primarily for the next day?

A: I explained to my commanding officer the situation that occurred.

Q: When you arrived the next day for tour?

A: Yes.

Q: Which commanding officer was that?

A: Cpt. O'Toole.

The Respondent told O'Toole "the situation that occurred" and that he was truly unhappy with [REDACTED] and that he wanted him transferred off his team and that he thought there should be some disciplinary action taken against him.

He said he also spoke to [REDACTED] that day and told him that he was extremely unprofessional. He said he told [REDACTED] that he was going to be kept in house and taken off the street. The Respondent testified that [REDACTED] started crying and apologized "vehemently" asking him to give him another chance. The Respondent asserted that up to that time [REDACTED] had not mentioned anything about alcohol.

The following day or the day after, the Respondent said, the video of him purchasing the beer turned up and was turned over to IAB.

The Respondent then pled guilty to Specification Nos. 4 and 5. In explanation the Respondent stated that, looking back, [REDACTED] "could have been and should have been suspended on the spot as well as EDP'd on the spot with the local Sheriff's Department coming to the scene." He said his intention was to keep it in house and to discipline him after conferring with a CO. The Respondent stated: "I plead guilty to it because of the action I did that night and knowing that he was close to home and he was on the phone and that he was home. I then went back to the city. That was a mistake on my part." The Respondent also indicated that he knew [REDACTED] had gotten home before the Respondent headed back to the city.

On cross-examination the Respondent indicated that he worked with [REDACTED] for about four years and that he never knew of any prior disciplinary matter that [REDACTED] had for drinking while on duty. The Respondent did not recall any prior incident in which he was GOed about drinking while on duty. He did recall stating to Lamberty at his Official Department Interview that he had consumed alcohol while on duty in the past and that he had been authorized to do so. He indicated he is authorized to use alcohol if he believes it is in the interest of doing a proper reconnaissance: "I am the one that is doing the reconnaissance. I have the authorization to say yes or no to that."

The Respondent recalled that he had a conversation with O'Toole "probably" once he assumed command. He didn't recall the exact words but he believed that O'Toole told him he had the authorization to make a decision on the use of alcohol as a

prop. When asked by the Court if on this particular day he was specifically authorized to use alcohol the Respondent stated that he wasn't "unauthorized."

When asked again by the Court if he was specifically authorized, he stated: "I believe so." However, he acknowledged that he did not have a specific discussion with a superior authorizing him to use alcohol for the surveillance in this police action.

The Respondent acknowledged that he formerly drank alcoholic beverages while conducting surveillances and that he did it to blend into the area. He acknowledged that he had never been to the area of this surveillance before but pointed out that he had information from a confidential informant that there was construction in the area. He stated that he felt it was a good idea to blend in as construction workers and that is why they brought the beer. He described the surveillance as having a "lookout of the building that was an apartment that was where we were going to conduct a search warrant." He further indicated that they had a good view of the location from where the construction was being done.

The Respondent acknowledged that he had occasion to drink alcohol in the past as an undercover officer. He indicated that there could be numerous types of undercover operations which would entail drinking to blend in and cited as examples a bar or a ball field or places where there is drug dealing.

When asked if he thought it was a good idea to let I [REDACTED] get out of the car and leave him in an area the Respondent was unfamiliar with the Respondent indicated that [REDACTED] jumped out of the car and that numerous efforts were made to get him back into the car.

The Respondent indicated that during the surveillance they were about a block away from the location. The questioning then went back to the time when [REDACTED] left the vehicle and the Respondent indicated that the conversation that occurred before that had to do with the fact that they were going out to eat and that [REDACTED] did not want to.

The Respondent had done surveillances with [REDACTED] before and he had never gotten out of the car and that this was unusual.

The Respondent confirmed that he spoke with [REDACTED] the very next day or the following day and that he told him that he was unhappy with his actions of that night. He said he told [REDACTED] that he was extremely unprofessional, that it would not be tolerated, and that he would be removed from the investigative team. He said he had conferred with the Captain and that [REDACTED] would be sent to the Gang Division Wheel.

He again asserted that he told the Captain the next day. He said the situation in which Doheny got out of the car and didn't get back in the car was pretty serious.

On re-direct examination, the Respondent reaffirmed that he used alcohol in his prior undercover work and on prior reconnaissance operations similar to this one. He also reaffirmed that practice was something that "they" were well aware of for several months if not years under the command.

The Court asked what the basis was for his statement that O'Toole was aware he used alcohol as a prop. The Respondent stated:

I had spoken to him when occasions about all reconnaissance and that I have stated I had used alcohol as a prop to blend in certain areas and that he was fine with that and he authorized that type of behavior.

The Respondent indicated that this conversation had occurred prior to January 25, 2007.

The Respondent indicated that his tour that day started at about 1430 hours at Manhattan Gang which is at 133 Broadway. Then he recalled that he may have started his tour in the Bronx and then gone to Manhattan. He agreed that he went to Orange County in a Department car and that he left New York City with Cahill and that they picked [REDACTED] up about a block from his home in Orange County. He believed [REDACTED] started his tour at 4:00 or 4:30 and later confirmed from documents that he worked a 4 to 12 tour.

The Respondent testified that he went back to execute the warrant the next day.

The Court's Witness

The Court called Captain Terence O'Toole as a witness.

Captain Terence O'Toole

O'Toole has been with the Police Department for twenty-three years. He has been the commanding officer of Manhattan Gang since June 2006. The Respondent had been in Gang before O'Toole got there. Other than telling him to be in court no one has spoken to O'Toole about the case in the last two weeks.

O'Toole testified that he first learned of the incident involving the Respondent and [REDACTED] "several days later." When asked how he learned of it, O'Toole said: "He presented a videotape to Lieutenant Delgado and Lieutenant Delgado viewed it and he told—I believe he told Lieutenant Delgado that he left him, left the vehicle that they were assigned in somewhere in Orange County."

O'Toole asserted that this happened several days after the incident. He did not think it was as long as a week but he did think it was "maybe over a weekend."

When asked if there had ever been a discussion with the Respondent and/or with other supervisors in the command about the use of beer as a prop while in an undercover capacity, O'Toole responded: "We never really discussed it, but it was a standard practice in narcotics division cases to use alcoholic beverages as cover, safety and cover."

He explained that if an officer is assigned to surveil a location where other people would normally have liquor available, either on the street or in a nightclub or bar it would not be uncommon to consume alcohol. To his knowledge there was no special procedure connected with doing so nor was there any prior advance notice requirement that O'Toole knew of. He said: "The only thing I think was it was recommended to be only one or two drinks." He further indicated that there was no special report that he knew of that had to be prepared prior to or after the use of alcoholic beverages.

As far as O'Toole was aware, if a couple of cans of beer were used as a prop in the Orange County surveillance that would not violate any rules.

On examination by the Assistant Department Advocate, O'Toole indicated that he did not recall giving the Respondent verbal permission to purchase alcohol while on duty and bring it into a Department vehicle. He indicated that there were no guidelines as to when one could use alcohol while conducting a surveillance.

O'Toole did know something about [REDACTED] having an alcoholic history. He recalled that [REDACTED] did get charges in the past but before his tenure. He did not have the specifics but he had been suspended for being unfit for duty. He was not aware of [REDACTED] being upset with the Respondent because [REDACTED] no longer drank alcohol.

On questioning by the Respondent, O'Toole reiterated that he became aware of the incident of January 25, 2007 within a few days but no more than a week after. He further made clear that that was through the complaint of [REDACTED]. He indicated that when he became aware of the complaint itself he was not aware of the facts and circumstances.

He stated that a videotape was presented to Delgado and the receipt for purchase for three bottles of beer. He said he directed Delgado to present the tape to IAB and report it through channels. He did not remember if he viewed the videotape himself.

O'Toole testified that he became aware of the Respondent's reason for purchasing the alcohol "at a later time."

He indicated that he became aware that there was a surveillance at the location and that a search warrant for the location was executed shortly thereafter. He also learned that the Respondent was using the beer as a prop. He indicated that he did not know the entire circumstances but noted that if the circumstances called for it the use of alcohol as a prop would have been permissible. O'Toole was not aware of anything in the Patrol Guide that would prohibit beer from being used as a prop.

FINDINGS AND ANALYSIS

There is no question that on January 25, 2007 the Respondent led a team composed of himself and two detectives, Cahill and [REDACTED] on a surveillance of a location in Orange County that was to be the subject of a search warrant the next day. Near their destination he purchased three bottles of beer which he says were to be used as props while the men stood out in the street conducting their surveillance. He said that he

understood there was construction going on in the area and it would help make them look like construction workers.

There was some disagreement over whether [REDACTED] protested at the time over the use of beer as a prop or whether he threw the beer out of the window. The Assistant Department Advocate has argued that the Respondent was insensitive to [REDACTED]'s concern about the use of alcohol. Neither Cahill nor [REDACTED] testified and it is impossible to know what discussions, if any, were had in the car that day regarding the beer. Further, failing to address [REDACTED]'s needs is not charged.

The first three specifications relate to the transportation, distribution and consumption of this beer and the Respondent admits that he purchased three bottles of beer, that he took them into the car and distributed them to the detectives, and that they consumed beer while on the surveillance.

Specification No. 1 is the only one of these charges that references a section of the Patrol Guide that directly addresses the conduct. Patrol Guide §203-10 (2) prohibits: "Bringing or permitting an intoxicant to be brought into a Department building, facility, booth, boat, or vehicle, except in performance of police duty." Specification Nos. 2 & 3 charge "conduct prejudicial" in that he "did wrongfully consume an intoxicant, to wit: a quantity of beer, while on duty" (Specification No. 2) and that he "did wrongfully distribute intoxicants, to wit; a quantity of beer" to members of the service "while conducting a surveillance operation" (Specification No. 3).

With regard to Specification No. 1 it is obviously this last phrase of the Patrol Guide section charged which forms the defense because the Respondent claims that his

purchase and use of the alcohol were in the performance of police duties. It would also seem reasonable that that defense would apply to the other two specifications as well.

There is ample evidence that this is what the Respondent was doing. In her closing argument the Assistant Department Advocate indicated that the Respondent was using the surveillance as an excuse to drink beer. But as counsel for the Respondent pointed out, at the time of this incident, there was no rule that prohibited an on duty member of the service from having an alcoholic beverage on meal break as long as he or she was not in uniform.¹ Consequently if the Respondent wanted a beer he did not need to use the surveillance as an excuse.

Moreover, the Respondent did not buy a six pack or some other quantity of alcohol that would support the notion that the surveillance was just an excuse to have a drink. The Respondent bought one bottle of beer for each of the men involved in the surveillance. His explanation makes sense. Three men had to be in a location for a period of between thirty and forty-five minutes in the vicinity of what they believed was a place where criminal activity was occurring. Whether using beer as a prop was the only or the wisest option available is not the issue. The issue is whether this was something that was done in the performance of police duty. The answer seems to be yes.

The second question was: did he need prior specific authorization to use alcohol as a prop? It should be noted that there is no charge that he acted without required

¹ As the Court noted Interim Order No. 37 issued on September 12, 2008 modified Patrol Guide 212-02 entitled "Meal Period" and Patrol Guide 203-06 entitled "Performance On Duty" and provides in pertinent part that: All on-duty members of the service, whether in uniform or civilian clothes, are strictly prohibited from consuming intoxicants in any amount. This includes members during their meal period. However, members assigned to duty in civilian clothes may be granted permission by the bureau chief/counterpart concerned based upon the nature of the member's assignment.

authorization but the issue was raised at trial by the Department and therefore should be addressed.

The Respondent testified that he believed he had discussed the matter generally with O'Toole shortly after O'Toole took command and that he had the authority to authorize the use of alcohol on his own.

While O'Toole did not recall any such discussion with the Respondent, he did indicate that he did not see a problem with the Respondent using alcohol as a prop if the Respondent saw the need to do so. So it would appear that there was no policy in the command for the Respondent to get specific approval to use alcohol and that as a sergeant in the field he was given latitude to make that decision.

The Department has argued that the use of alcohol was not necessary, but that is a determination made after the fact. There was no rule at the time compelling a higher authority to review and determine if the use of alcohol as a prop was reasonable and appropriate in advance of the operation.²

One other point needs to be made. Specification No. 2 charges the Respondent with consuming beer while on-duty while Specification No. 3 charges the Respondent with distributing beer while conducting a surveillance operation. The evidence is that the beer was distributed in the car prior to the actual surveillance.

The evidence also indicates that the consumption of the beer occurred during the actual surveillance. This is significant because Lamberty initially testified that Cahill had stated that the consumption of alcohol started in the car before the surveillance.

Consumption of alcohol in the car on the way to the surveillance would be strong

² Obviously the issuance of Interim Order No. 37 would impact on a situation such as this were it to occur at any time after its effective date. This incident preceded the issuance of that order.

evidence in favor of the Department's argument that the surveillance was an excuse to drink beer. However, on cross-examination Lamberty acknowledged that Cahill did not say that; consequently, the only evidence before this Court is that whatever consumption of beer occurred happened only during the actual surveillance.

Based on the above, the Respondent should be found not guilty of Specification Nos. 1, 2, and 3.

With respect to Specification Nos. 4 & 5 the Respondent pled guilty. He offered as mitigation the fact that he reported the matter the next day.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Department on February 28, 1994. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has been found guilty of failing to supervise [REDACTED] when [REDACTED] left his post for approximately three hours and failing to report this matter to his commanding officer or to the Internal Affairs Bureau.

The Respondent has admitted his guilt on these matters and offered evidence and endeavored to mitigate the situation by noting that he did try to get [REDACTED] to get back into the car and that he did report the matter to his commanding officer, O'Toole, the next day.

Unfortunately there is a problem with this in that O'Toole testified that he was informed several days later. Indeed O'Toole testified that he first learned of the incident when he was told about the videotape [REDACTED] had brought in depicting the purchase of beer and that he learned about the entire incident after that.

The Court found O'Toole's testimony on this highly credible. O'Toole was a disinterested witness. He seemed to remember the events clearly, indeed even recalling that a weekend intervened. Consequently, the Respondent's assertion that he reported the matter the next day is not credible.

Moreover the Court takes note of the fact that January 25, 2007 was a Thursday and that would mean there was a delay of at least three days in reporting this matter.

This takes on additional significance when one takes into consideration what the Respondent said in response to a question about his state of mind when [REDACTED] left the vehicle:

It was a very difficult situation, one that I certainly had never been in before, and working closely with a team under my immediate supervision, knowing them as well as I do, looking back on it certainly he could have been and should have been suspended on the spot as well as EDP'd on the spot with the local Sheriff's Department coming to the scene.

In the Respondent's version of events there were no problems with [REDACTED] until the Respondent decided to stop at a diner to eat. [REDACTED] lived in Orange County near both the surveillance and the diner. The Respondent acknowledged that [REDACTED] was picked up near his home on the way to the surveillance. On its face it is not surprising that [REDACTED] would have had no desire to go the city and wanted instead to go home


rather than to the diner. While we don't know exactly what transpired it is surprising to hear the Respondent refer to him as an Emotionally Disturbed Person and speak about the need for calling in the local police when there is nothing in what he said about the incident that would justify such drastic action.

On the other hand if there was a basis for believing that [REDACTED] was an Emotionally Disturbed Person then the failure to notify the Duty Captain or the Internal Affairs Bureau immediately takes on far greater significance than a mere AWOL situation. [REDACTED] was after all, at that time, an armed, full duty member of the service.

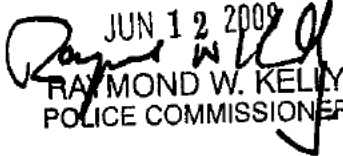
The testimony of O'Toole indicates that the Respondent did not report [REDACTED]'s AWOL immediately and indeed it appears his commanding officer only became aware of it after the situation came to his attention through the actions of [REDACTED]. That fact and the statements of the Respondent reveal that the situation regarding Specification Nos. 3 and 4 constitutes a serious violation of well-established Department procedures regarding timely notification, not to mention a continued lack of insight by the Respondent in how to handle a difficult situation.

As a consequence, I recommend a penalty of the loss of 25 vacation days.

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner – Trials

APPROVED

JUN 12 2009

RAYMOND W. KELLY
POLICE COMMISSIONER